

STATE OF MICHIGAN
COURT OF APPEALS

ROBERT C. J. TUTTLE and LINDA A. TUTTLE,

Petitioners-Appellants,

UNPUBLISHED
January 16, 2001

v

No. 216803
Tax Tribunal
LC No. 228389

TOWNSHIP OF BEAR LAKE,

Respondent-Appellee.

Before: Kelly, P.J., and Whitbeck and Collins, JJ.

PER CURIAM.

Petitioners appeal as of right from an opinion and judgment of the Michigan Tax Tribunal affirming respondent's assessment of their nonhomestead property for the years 1995 through 1998. We affirm.

Petitioners' summer home was built in 1994. In 1995, using a cost-less-depreciation approach and applying an economic condition factor (ECF) of 1.29, respondent determined that the home and the land on which it stands had a true cash value of \$260,311, and an assessed value of \$130,200. On appeal, the Tax Tribunal found that respondent's assessment was supported by appropriate methodology and sufficient evidence of the property's true cash value, and that petitioners failed to provide any market data to support their assertion that respondent's determination of the true cash value of their property was in error. The Tax Tribunal then affirmed the 1995 assessment, as well as those of the following years.¹

As an initial matter, we address petitioners' argument that the Tax Tribunal erred in failing to exclude as untimely exhibits mailed by respondent to the Tax Tribunal and petitioners sixteen days before the Tax Tribunal hearing. Petitioners contend that because they received the exhibits only thirteen days before the hearing, and not fourteen days as required, the exhibits should have been excluded. The Tax Tribunal has wide latitude in the admission of evidence.

¹ When an appeal of a residential assessment is under consideration, each subsequent year's assessment is automatically added to the petition. MCL 205.737(5)(b); MSA 7.650(37)(5)(b).

Georgetown Place Cooperative v City of Taylor, 226 Mich App 33, 52; 572 NW2d 232 (1997). The Tax Tribunal has created its own procedural rules, but those rules specifically provide that if an applicable Tax Tribunal rule does not exist, the Michigan Court Rules and chapter 4 of 1969 PA 306, as amended, MCL 24.271 *et seq.*; MSA 3.560(171) *et seq.*, shall govern. TTR 205.1111. While the Tax Tribunal rules mandate service of exhibits fourteen days prior to a hearing, TTR 205.1342(2), the rules do not describe how service of the evidence is to be accomplished or when service is complete. MCR 2.107(C)(3) provides that service of papers may be made by mailing and that service is complete at the time of mailing. *Wilson v General Motors Corp*, 183 Mich App 21, 38; 454 NW2d 405 (1990).

Here, respondent mailed petitioners a packet containing several exhibits that was postmarked November 4, 1998. The Tax Tribunal hearing was scheduled for November 20, 1998. Pursuant to MCR 2.107(C)(3), service of the evidence was complete upon mailing, which was sixteen days before the hearing; therefore, the fourteen day requirement was met. The Tax Tribunal did not err in ruling that the evidence was timely provided and was, therefore, admissible.

Next, petitioners argue that the Tax Tribunal erred in affirming the assessment of their property, because that assessment included application of an ECF. Specifically, petitioners contend that it is an error of law to apply an ECF to a newly constructed home such as theirs, and that the particular ECF applied in this case was not supported by competent evidence. Absent fraud, this Court's review of a Tax Tribunal decision is limited to determining whether the tribunal made an error of law or adopted a wrong legal principle; its factual findings are upheld unless they are not supported by competent, material, and substantial evidence. *Georgetown Place Cooperative, supra* at 43. Substantial evidence must be more than a scintilla of evidence, although it may be substantially less than a preponderance of the evidence. *Jones & Laughlin Steel Corp v City of Warren*, 193 Mich App 348, 352-353; 483 NW2d 416 (1992). Failure to base a decision on competent, material, and substantial evidence constitutes an error of law requiring reversal. *Oldenburg v Dryden Twp*, 198 Mich App 696, 698; 499 NW2d 416 (1993).

The Michigan Constitution provides for ad valorem² taxation of real property at a rate of no more than fifty percent of the property's assessed true cash value. Const 1963, art 9, § 3. Cash value of property is statutorily defined as "the usual selling price at the place where the property to which the term is applied is at the time of assessment, being the price that could be obtained for the property at private sale, and not at auction sale except as otherwise provided in this section, or at forced sale." MCL 211.27(1); MSA 7.27(1). In other words, true cash value is the fair market value of the property. *Great Lakes Div of Nat Steel Corp v City of Ecorse*, 227 Mich App 379, 389; 576 NW2d 667 (1998).

The burden of proof is on the taxpayer to establish the true cash value of the property. MCL 205.737(3); MSA 7.650(37)(3); *Oldenburg, supra* at 698-699.

² Black's Law Dictionary (6th ed) defines ad valorem tax as "[a] tax levied on property or an article of commerce in proportion to its value as determined by assessment or appraisal."

The burden of proof encompasses two concepts: (1) the burden of persuasion, which does not shift during the course of the hearing, and (2) the burden of going forward with the evidence, which may shift to the opposing party. Provisions in the Tax Tribunal Act concerning the burden of proof and the de novo nature of the Tax Tribunal proceedings, MCL 205.735; MSA 7.650(35) and MCL 205.737; MSA 7.650(37), have been construed as imposing the burden on the petitioner to establish true cash value while, at the same time, imposing a duty on the Tax Tribunal to make an independent determination of true cash value. [*Great Lakes Div, supra* at 408-409. Citations omitted.]

The Tax Tribunal must select a method for determining true cash value which is recognized and reasonably related to the fair market value of the property. *Pinelake Housing Cooperative v City of Ann Arbor*, 159 Mich App 208, 221; 406 NW2d 832 (1987). Whatever the method of valuation used, it must be based on current market conditions. *Id.* An ECF is derived from a thirty-month analysis of market sales and is used to adjust cost approach appraisals to arrive at true cash value. *Tatham v City of Birmingham*, 119 Mich App 583, 586; 326 NW2d 568 (1982).

We find no error in the Tax Tribunal's adoption of the assessor's methodology, including application of the ECF. Although petitioners contend that the value of their home should have been determined by adding the cost of construction to the value of the lot, as respondent points out, true cash value is not defined as the replacement value of property. An assessor is required to take a structure's location and other market conditions into consideration when determining an assessment. MCL 211.27(1); MSA 7.27(1). Further, we are aware of no statutory bar to applying an ECF to new construction, and petitioners point to no authority prohibiting its use. We conclude, therefore, that the Tax Tribunal did not err in applying the law, nor did it adopt a wrong legal principle.

We also find no error in the Tax Tribunal's adoption of the ECF of 1.29. The Tax Tribunal relied upon a summary chart provided by respondent showing three sales over a thirty-month period³ that it relied upon in arriving at the ECF of 1.29.⁴ Petitioners provided no evidence of error in respondent's data or its calculations. They contend on appeal that prior to receipt of the exhibits mailed November 4, 1998, they had no idea how the township arrived at the ECF of 1.29, and because they received respondent's chart so close to the date of the hearing, they did not have an opportunity to collect information to refute respondent's data or analysis. However, discovery is available by leave in the small claims division of the Tax Tribunal. TTR 205.1111(3). Petitioners did not seek leave to conduct discovery of any nature earlier in the case, nor did they provide to the Tax Tribunal an independent market analysis of their property.

³ Respondent asserts, and petitioner does not contest, that these three sales were the only three to occur in the relevant area over the thirty-month time period.

⁴ Petitioners contend that the chart is a "litigation-induced document" that did not exist at the time the assessment was determined or first contested and, therefore, should not be considered as evidence of the legitimacy of the 1.29 ECF. However, petitioners point to no errors in data or calculations establishing the ECF of 1.29, and it is undisputed that the ECF applied in assessing petitioners' property was 1.29.

Because petitioners did not meet their burden of establishing the true cash value of their property, and the evidence presented to the Tax Tribunal was sufficient to support respondent's assessments, we conclude that the Tax Tribunal did not err in affirming respondent's assessments.

Affirmed.

/s/ William C. Whitbeck

/s/ Jeffrey G. Collins